Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-730

AMERICAN EXPORT LINES, INC. AND MEDITERRANEAN MARINE LINES, INC.,

Petitioners,

—against—

METAL TRADERS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

The issues in this case involve solely factual determinations of liability arising out of a loss of containerized cargo at sea. Petitioners American Export Lines, Inc. ("AEL") and Mediterranean Marine Lines Inc. ("MML"), AEL's subsidiary (hereinafter, for convenience referred to collectively as "AEL"), already have lost this case three times: first, before the United States District Court for the Southern District of New York, which totally absolved Respondent Metal Traders, Inc. ("MT") from any liability and found AEL's negligence to be the sole proximate cause of the loss; secondly, before the United States Court of Appeals for the Second Circuit, which unanimously affirmed the District Court's determination; and finally,

again before the Second Circuit, which denied AEL's Motion for Reargument.

AEL now petitions this Court in an effort to obtain a fourth "bite at the apple". In an attempt to persuade this Court that vital legal questions are presented, AEL misconstrues the nature of the case and the proceedings and determinations below to such an extent that the recitation in the Petition bears little resemblance to what actually transpired. The most egregious aspect of the Petition is its false premise, to wit, that the liability trial was concerned with assessing degrees of fault between defendants, whereas, in fact, its very purpose was to determine whether any liability to plaintiffs existed.

The simple truth is that AEL was found liable on the basis of the evidence adduced and that no alleged acts of omissions by MT contributed to the loss. In view of such determination, it was unnecessary for the Courts below to reach the questions of law which AEL would now seek permission to have this Court review.[1]

In short, this case raises no real questions of law, and, in any event, is not an appropriate vehicle for a consideration thereof. Accordingly, it is respectfully urged that AEL's petition be, in all respects, denied.

Counterstatement of the Case

AEL's statement of the case, particularly the "facts" set forth throughout its Petition, is so fraught with inaccuracies that correction is required.

At approximately 6:24 A.M. on January 10, 1974, the S.S. Red Jacket, a container ship owned and operated by AEL, while sailing through a severe storm in the North Pacific,

[1] AEL presented to the Second Circuit the same arguments it seeks to raise here. The Second Circuit, by affirming the District Court's findings under the "clearly erroneous" rule, agreed that only factual questions were involved.

suffered a casualty when some 50 laden ocean shipping containers, all stowed on deck at the Red Jacket's number 6 hatch, were either lost overboard or severly damaged. MT had shipped eight containers of Banka Brand tin ingots on said voyage. Those containers, which were consigned to plaintiffs Mitsui and Ataka in Japan, were located at various stowage positions on the vessel, including some at hatch #6.

As a result of such casualty, AEL was sued by various shippers and/or consignees for loss and/or damage to their cargo. Eventually eleven lawsuits were filed seeking a collective recovery of more than $1,300,000 for the alleged losses.

In each such action, AEL either impleaded or cross-claimed against MT alleging, in essence, that the tin ingots shipped by MT were improperly packed and responsible for the loss. MT, in turn, impleaded the United States of America ("U.S."), from whom MT purchased the tin ingots already packed by the U.S. in sealed containers, alleging that if the tin ingots indeed were responsible for the loss, it was the sole fault of the U.S. in failing properly to pack them for ocean shipment.

The eleven actions were consolidated for both pre-trial proceedings and trial. The consolidated case was tried on a bifurcated basis, with liability tried first. The liability issues were tried extensively to the Court sitting without a jury from December 13, 1976 through December 29, 1976. On May 24, 1977, the District Court filed its opinion finding, in quite vivid and detailed terms, AEL solely responsible for the loss and completely absolving MT and the U.S. from liability (5-A)[2].

It was AEL's contention at trial that the casualty was caused by *one* container[3] (CMLU 122590) in which were stowed 16 tons of ingots shipped by MT. That container was stowed on deck at hatch No. 6 at stowage position 608 aft,

[2] (A) refers to the Appendix to AEL's Petition.

[3] AEL's "two container" theory first unsuccessfully surfaced before the Court of Appeals.

located at the bottom row of the third tier of containers inward from the port side of the vessel. It was AEL's conjecture that the ingots in that container broke through the port side container wall, pushing or incredibly "running through" the cargo of the two adjacent port-side containers, pushing them overboard and resulting in a loosening of the stow, which allegedly caused the remaining containers, in a domino-like effect, to fall over the side on each succeeding roll of the vessel or otherwise be severely damaged. No competent evidence was adduced by AEL to support this speculative theory.

MT contended that it was in no way at fault; that the ingots were properly packed in the containers, but that in any event the casualty could not have been, and was not, caused by any alleged negligence in loading the tin ingots in the containers. MT offered and proved at trial (although not required to do so) that AEL was negligent in many respects and it was in fact AEL's sole negligence which proximately caused the loss.

Specifically, MT contended primarily that the containers furnished by AEL, particularly CMLU 122590 which allegedly initiated the collapse, was defective and unseaworthy; that the containers were improperly lashed; that the containers had not been properly maintained, repaired and inspected; that shippers of dense cargo such as MT had not been properly advised with respect to stowage and that special purpose containers were available and should have been furnished by AEL for the stowage of MT's cargo; and that if MT's cargo indeed was improperly stowed, AEL either actually knew or should have known about it in sufficient time to take corrective action, but failed to do so. In this connection, the District Court, in summary, specifically found:

a. That AEL was negligent in permitting container CMLU 122590 to be loaded on board the Red Jacket with major structural damage (26-A);

b. That container CMLU 122590 was unseaworthy (26-A);

c. That AEL was negligent in failing to require shippers of sealed house to house containers to disclose on the bill of lading the manner in which the cargo was packed and secured within the container (28-A);

d. That AEL was negligent in failing to supply MT with a gondola or half-height container for the carriage of its heavy, dense cargo (28-A);

e. That AEL failed to exercise due diligence in permitting container CMLU 122590 to be loaded on board (31-32A);

f. That AEL failed to exercise due diligence in not requiring more than a cursory inspection of its containers at the time of loading (32-A); and

g. That AEL failed to exercise due diligence by omitting to contemporaneously investigate the nature and extent of the severe structural damage to container CMLU 122590 (33-A).

From among the numerous instances of negligence bordering upon recklessness on the part of AEL, the District Court found the following to be the sole and concurrent proximate causes of the loss:

a. AEL's negligence in permitting container CMLU 122590 to be loaded on board the vessel with major structural damage (26-A);

b. The unseaworthiness of container CMLU 122590 (26-A);

c. The "racking" (17-A) phenomenon to which the already old, weakened, negligently maintained and damaged container CMLU 122590 was subjected to on the voyage in question (27-A); and

d. AEL's lack of due diligence at the commencement of the voyage to make the ship's cargo containers seaworthy and the consequent and obvious unseaworthiness of container CMLU 122590 (33-A).

Having found AEL's negligent conduct to have proximately caused the casualty, the District Court then focused upon the collapse of container CMLU 122590 itself. In this connection the District Court found that:

> " . . . the collapse of container CMLU 122590 was caused by the age of the container, its damaged condition and severe racking . . ." (28-A)

In reaching its determination, the District Court carefully reviewed the evidence as to the role of the ingots in the catastrophe. Based upon all the evidence, including lengthy expert testimony, the District Court properly concluded that irrespective of the fact that container CMLU 122590 carried tin ingots, or the manner in which said cargo was packed in the container, the casualty was caused solely by AEL's negligence and the unseaworthiness of its container. In short, but for AEL's negligence, the accident would not have happened whereas MT's negligence, if any, was found to have no relationship to the occurrence.

AEL seriously misstates the portions of the record and the facts hereinafter discussed apparently in a desperate attempt to bolster its unfounded contentions of law concerning apportionment of damages which were neither germane to the District Court's determination nor even reached by the Second Circuit Court of Appeals.[4]

Reasons for Denying Writ

This case neither presents important legal questions nor does it even provide a proper factual context for the consid-

[4] Indeed, AEL's entire argument here, previously made to the Second Circuit, ignores the vital fact that MT's negligence, if any, was found *not* to have been a contributing cause of the loss. AEL's arguments could only gain currency if the Courts below found *concurrent causation* on the part of MT and AEL.

eration of such questions. Apparently recognizing the deficiencies in this regard, AEL attempts to create such a case:

a. AEL states that the liability trial concerned only the "degree of fault" among defendants (Petition, p. 4), implying that causation was not an issue. In reality, the damage trial did not even reach the issue of the degree of fault between the parties inasmuch as it was found that MT's cargo was not responsible for the loss.

b. AEL refers to a stipulation between the parties agreeing that plaintiffs were entitled to recover their losses (Petition, pp. 3, 16). Contrary to the implication AEL seeks to create, defendants did not stipulate that they were *liable* to plaintiffs. Who, as among the defendants, would bear responsibility for the catastrophe, was the very subject of the liability trial, since each defendant denied any liability at all. Indeed, plaintiffs fully participated at the trial and were found to have made out a *prima facie* case against the carrier, AEL (30-A).

c. AEL also attempts to "color" its argument by now contending that two of the containers shipped by MT, one on the port and one on the starboard side caused the loss. In fact, while AEL lamely claimed that one of the containers on the starboard side stowed with MT's cargo was involved, it offered no credible proof on that issue. Indeed, AEL's entire case was directed toward proving that the port side ingot container, CMLU 122590, precipitated the casualty.

d. To lend a further aura of substance to its argument, AEL regrettably misstates the District Court's opinion (Petition, p. 14). A mere glance at the pertinent portion of District Court's opinion (22-A) discloses that the Court was merely reciting AEL's *contentions* as to how the casualty occurred. The District Court was there referring (23-A) only to the plausability of the theory that the collapse of container 122590 precipitated the casualty, *and clearly not as to what caused the container to collapse, or AEL's theory of the role of the tin ingots therein.* This is made crystal clear by a full quotation of this

portion of the District Court's opinion, the last sentence of which AEL has omitted:

> "The Court finds this theory of how the catastrophe occurred plausible and supported, in the main, by a fair preponderance of the credible evidence. *However, the Court concludes that the role of the unrestrained ingots in this catastrophe was not established by a fair preponderance of the evidence."* (23-A, emphasis added)

The District Court then went on to marshall the overwhelming evidence of AEL's liability and MT's lack thereof. (23-28A).

Thus, inasmuch as there was no finding of concurrent fault, apportionment of damages is clearly not a proper subject for review by this Court, particularly within the context of this case. Indeed, AEL's entire case against MT was constructed of the sheerest speculation and conjecture.

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IN ANY EVENT, THE ISSUES AEL PROFFERS FOR REVIEW HAVE BEEN LONG SINCE PREVIOUSLY DETERMINED BY THIS COURT IN A MANNER ADVERSE TO AEL'S POSITION

As previously noted and directly contrary to the decisions of the Courts below, AEL's argument is based on the erroneous and misleading premise that the conduct of both AEL and MT caused the casualty.

Within this fanciful context, AEL proceeds to argue that damages should be apportioned. But, even assuming that such issue was ripe for determination, the rules governing apportionment of damages in cargo loss cases were long ago determined by this Court in *Schnell* v. *The Vallescura* 293 U.S. 296 (1934) and have since been consistently applied by the several Circuit Courts, including the Second Circuit. *Vana Trading Co., Inc.* v. *S.S. Mette Skou* 556 F2d 100 (2d Cir), *cert. denied* 434 U.S. 892 (1977); *J. Gerber & Company* v. *S.S. Sabine Howalt* 437 F2d 580 (2d Cir, 1971); *Lekas & Drivas, Inc.* v. *Goulandris* 306 F2d 246 (2d Cir. 1962).

AEL attempts to avoid this tremendous weight of authority by arguing that the Carriage of Goods by Sea Act (COGSA) is not applicable, because MT, clearly a "shipper" within the meaning of COGSA, was a defendant and not a plaintiff. Nowhere does any language in COGSA admit of the construction that AEL seeks, and AEL has pointed to no convincing authorities which support that view.

Furthermore, AEL overlooks the fact that *it* is governed by COGSA. Thus, as AEL explains (Petition, p. 12), once the plaintiff shippers have made out a *prima facie* case against the carrier (which they did in this case (30-A)), the carrier, in order to escape liability, must show that the damages resulted from an excepted cause under COGSA. This AEL attempted, *but failed to do,* by its claims that MT's cargo caused the loss. As a result of that failure of proof, and not by reason of the rules laid down by this Court in the *Vallescura* case, *supra,* AEL was found to be solely responsible for the loss.

A final word may be appropriate. The so-called "container revolution" indisputably has been of tremendous economic benefit to the shipping industry. However, shipping companies, such as AEL, have attempted to utilize containerization as a vehicle for avoiding their duties and responsibilities at the expense of innocent and unsuspecting cargo shippers. AEL cannot use COGSA as both a shield and a sword. The matter presently before this Court, presents a clear case in point.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that AEL's Petition, should be denied in all respects.

Respectfully Submitted,

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